111 I.A. 2nd 34

53309

PHILLIP ALGOZINO, Plaintiff-Appellee, v. POLICE BOARD OF THE CITY OF CHICAGO, ILLINOIS, and JAMES B. CONLISK, Jr., Superintendent of Police of the City of Chicago, and O. W. WILSON, Defendants-Appellants.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Honorable Edward J. Egan, Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an administrative review action. Plaintiff sought to set aside an order of the Police Board of the City of Chicago which discharged him as a patrolman. In substance, plaintiff's complaint alleged that the order of the Police Board was not supported by competent or legal evidence and was against the manifest weight of the evidence.

On May 3, 1968, the trial court entered an order which modified the finding and decision of the Police Board and limited the plaintiff to a suspension of one year. On June 3, 1968, the trial court vacated its order of May 3 and then entered a new order reversing the findings and decisions of the Police Board.

On appeal defendants-appellants seek the reversal of the orders of May 3, 1968, and of June 3, 1968.

The defendants-appellants have filed their brief, abstract and record and have complied with all the statutory requirements and with the rules of this court. No appearance or brief was filed in this court by the plaintiff-appellee.

Where an appellee has not filed a brief in the reviewing court, the order or judgment which is the subject of the appeal may be reversed without consideration of the cause on its merits.

Parkside Realty Co. v. License Appeal Comm., 87 Ill. App.2d 374, 231 N.E.2d 654 (1967).

Pursuant to the foregoing rule, we have decided to reverse the trial court orders of May 3, 1968, and June 3, 1968, without consideration of the cause on its merits.

REVERSED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

111 I.A. 2nd 42

53448

IN THE MATTER OF THE ESTATE OF JOHN TOLASH, Deceased JOHN JEROME TOLASH, Petitioner-Appellant vs. DECO PORCELAIN, INCORPORATED FIDELITY AND DEPOSIT COMPANY OF MARYLAND and CONTINENTAL CASUALTY COMPANY as Sureties LAW FIRM OF GORDON AND REICIN, Respondent-Appellees	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HON. JOHN JACOB GUTHMAN PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by John Jerome Tolash to vacate and set aside three orders of the Probate Division of the Circuit Court. Appellant's petition to vacate the three orders was filed April 3, 1968. After answers were filed and testimony was heard, Judge Guthman denied the petition. It is from this decision that the appeal is brought.

The record reveals that a final account was filed by John Jerome Tolash, administrator of the Estate of John Tolash, deceased, and an order was entered on March 2, 1967, closing the estate and discharging the administrator. Thereafter, on November 1, 1967, a petition was filed by Deco Porcelain Incorporated (hereinafter referred to as Deco) in which it was alleged that an order had been entered by the court directing the administrator to pay its claim as a preferred claim from the assets of decedent's business. It was alleged that this claim arose from the operation of decedent's business subsequent to the decedent's death and while the business was being operated pursuant to authority of the court. It was further alleged that the administrator filed his final account asking for his discharge without serving notice upon Deco. The petitioner, Deco, prayed that the final account

be set aside and that the administrator be required to show why he should not be personally liable to it for the amount of its claim.

After several continuances, an order was entered on February 23, 1968, which recited that the Deco claim of $3,000.00 had been allowed on June 5, 1966, and that the administrator had been ordered to pay it as a preferred claim out of the assets of decedent's business and in the ordinary course of administration. The February 23 order further recited that the administrator failed to give Deco notice as required by statute of the filing of his final account. The court found that the approval of the final account was improper and that $3,000.00 should have been distributed to Deco. The court ruled that the order of March 2, 1967, approving the final account be vacated; that John Jerome Tolash, as administrator, be ordered to pay Deco its claim of $3,000.00 within five days; and that upon receipt of such payment the estate would be closed and the administrator discharged.

On March 8, 1968, an order was entered by the Probate Court encompassing a settlement among all of the parties' counsel. The order recited that the administrator had failed to pay the sum of $3,000.00 in accordance with the February 23 order, and that John Jerome Tolash should show cause why he should not be held in contempt of court. The order further recited that it appeared to the court that the assets available for distribution on March 2, 1967, were $5,298.01 and that that amount was insufficient to pay all of the claims outstanding against the estate, thereby requiring a probate abatement of each of the claims allowed. It was ordered (1) that the Deco claim be abated by $500.00, reducing the amount to be paid to $2,500.00; (2) that the fee of Gordon &

Reicin, attorneys for the administrator, be abated by the sum of $900.00 and that that sum be paid by them to Deco; (3) that Fidelity and Deposit Company of Maryland, as surety on the bond of John Jerome Tolash, pay the sum of $1,173.33 to Deco; (4) that Continental Casualty Company, as surety on the additional bond of John Jerome Tolash, pay the sum of $ 426.67 to Deco. The order further recited that since it appeared to the court that the law firm of Gordon & Reicin and the two aforementioned sureties had paid to Deco the amounts as directed that the sureties and Gordon & Reicin were discharged and released from all further obligations. Judgments were entered on behalf of Fidelity and Continental against John Jerome Tolash, individually, in the amount of $1,173.33 and $426.67 respectively. The order was approved by Gordon & Reicin, by the attorneys for the two surety companies, and by the attorneys for Deco.

On the same day an order of discharge was entered approving the final account of the administrator, discharging John Jerome Tolash as administrator, cancelling his bond, and closing the estate.

On April 3, 1968, a petition was filed by John Jerome Tolash, by his attorneys, Riley & Carlson, to vacate the orders of February 23, 1968, and March 8, 1968, on the following grounds: (a) he did not receive notice of the proceedings which led to the three orders complained of; (b) he did not retain the law firm of Gordon & Reicin to represent him after his final account was approved and he was discharged as administrator on March 2, 1967; (c) the firm of Gordon & Reicin ceased to be his attorneys when the estate was closed; (d) the attorneys who filed the petition for Deco on November 1, 1967, erroneously served notice on Gordon & Reicin on the premise that they were still representing

him; (e) the attorneys for Deco never notified him in any manner; and (f) Gordon & Reicin continued to represent him and agreed to the entry of orders on his behalf when in fact they did not represent him.

An answer was filed by Gordon & Reicin to this petition. They stated that Tolash was called by them upon receipt of the notice of Deco's petition; that on March 10, 1968, Tolash was in their office, examined the petition and discussed the matter with them; and that the settlement entered into was with Tolash's consent and approval.

In Deco's answer to Tolash's petition it was admitted that upon initiation of their action Deco served notice on Gordon & Reicin "in accordance with the rules of practice of the Probate Court and the Illinois Supreme Court. "

In the joint answer filed by Fidelity and Continental, it was admitted that Gordon & Reicin continued to represent John Jerome Tolash, but denied that the law firm did not have authority to do so.

John J. Tolash, testifying at the hearing on his motion to vacate the three orders of the Probate Court, admitted that he retained Gordon & Reicin to represent the estate until it was closed, but that it was his understanding that they did not represent him in any capacity thereafter. He stated that he met with Gordon, Reicin and Michael Rotman in their office sometime during the first part of December, 1967, at the request of Rotman. While there, he was shown a legal paper and told that Deco was attacking the estate to recover some monies. Tolash said that he read the petition which stated, he said, that Deco had not been notified of the closing of the estate and due to the fact

that they had a first class claim "they were having the estate opened again to recover money from me." The petitioner said he inquired how Deco could possibly "recover money from me when I am dismissed as the administrator, and the estate is closed and I went through bankruptcy on their recommendation." He said when the attorneys told him he would have to come up with some money, he told them he absolutely would not. "This is when I became very angry and hit the ceiling. This is when I told them, 'This is your mistake. You pay the $3,000.00. It is not my fault. You are responsible.'" Tolash then stormed out of the office. He further testified that he was not told that a proceeding had been instituted to reopen the estate, that there was no discussion about retaining them as his attorneys and that he did not authorize them to represent him. He said he did not hear any more about the matter until February 13, 1968, when he received a letter from Gary L. Griffin of the firm of Dent, Hampton & Doten, stating that Griffin's firm represented Fidelity and Continental. The letter described Deco's claim and recited "we are of the opinion that its [Deco's] petition is proper and that it will be allowed by the Court. Demand is hereby made upon you to promptly pay Deco's claim. Your failure to do so will result in the court entering an order directing you to pay the sum." Tolash testified that this was the first knowledge he had that a petition had been filed to reopen the estate. He said he called Griffin about the 25th of February and asked him why he had to pay for somebody else's mistakes. The petitioner then testified that Griffin told him that the matter had been settled and when informed that Gordin & Reicin would file an answer for him he told Griffin that they were not his attorneys, whereupon Griffin advised him to get a lawyer.

Michael H. Rotman, associated with the firm of Gordon & Reicin, testified that he received a letter from a Mr. Casey, representing Deco, in September of 1967. Subsequently, he learned that Deco's claim was not a second class claim, but rather a claim under Section 213(a) of the Probate Act (Ill. Rev. Stat., 1967, ch. 3, §213(a)) and was a first class claim. Rotman said that there were a number of continuances and that during this period he told Tolash that Deco had filed a petition. He also stated that he discussed the matter with Tolash in his office. After a series of meetings with the sureties and their attorneys, Rotman said that it was determined that the matter could be settled for $2,500.00 and that he agreed to pay back $900.00 from his attorney's fees. He related that during the pendency of these negotiations that he was constantly in touch with John Jerome Tolash by phone. Before he arrived at the settlement, he called Tolash and gave him the figures. On cross-examination Rotman said there were some questions about Deco being named in the bankruptcy filed by Tolash. He also said that Tolash sent them a letter after their original meeting sometime in December of 1967, which reads:

> Re: Deco Porcelain, George Steere & Sons Div.
>
> Dear George:
>
> This is all I could find. I hope it is of use. Chatz may have the invoice. Check with him.
>
> Tolash.

Counsel for Tolash objected to the letter being entered into evidence on the grounds that it was not dated, that it was not signed, that it was hand printed, and that there were no means for its proper identification. Rotman replied "Let Mr. Tolash deny it is his printing." The Court inquired "Do you want to ask Mr. Tolash in open court about this memo?" Mr. Carlson replied

"May I make an inquiry of my client right now, Your Honor?" The Court "All right." Thereupon the record shows that the document was received in evidence.

Gary L. Griffin, associated with the firm of Dent, Hampton & Doten, testified that prior to the entry of the first of the three orders complained of, he spoke to Tolash about the letter he, Griffin, sent him. Tolash inquired why he would incur liability and Griffin told him because Deco had not been served with notice of the closing of the estate. Griffin said that he indicated to Tolash that he should talk to his attorneys, Gordon & Reicin. Griffin denied, however, that Tolash stated that Gordon & Reicin were not representing him. He further testified that he informed Tolash that an order would be entered by agreement of the parties directing him to pay $3,000.00, that if he did not,Griffin's clients, the surety companies, would be ordered to pay and that they in turn would expect Tolash to reimburse them. He said Tolash replied that he would be in contact with him.

On cross-examination, Griffin was asked why he sent the letter to Tolash rather than to Rotman, his counsel . Griffin answered that he did so because Mr. Tolash was the principal on their bond and their obligation was to him under the bond. He also said he sent copies of the letter he had sent Tolash to his two surety clients. When asked whether he was sure that Gordon & Reicin were representing Tolash, he replied "Gordon & Reicin told me they were representing him. When I spoke to Mr. Tolash over the phone, he certainly did not deny that they were representing him. I believe that Gordon & Reicin were representing John Tolash in this proceeding. If I hadn't believed that Gordon & Reicin were representing John Tolash, I

certainly would not have directed or recommended to my clients that they pay out any money on this estate." He again denied that Tolash told him that Gordon & Reicin were not his lawyers and that if Tolash had, he never would have entered into the agreed orders. The record shows that it was stipulated by Deco's attorney that he was under the impression that Gordon & Reicin were representing Tolash.

It is the contention of the petitioner, John Jerome Tolash, that (1) the denial to vacate the agreed orders of February 23 and March 8 is against the manifest weight of the evidence which showed that the petitioner never authorized, directed or retained the law firm of Gordon & Reicin to represent him in the matter of Deco's petition; (2) the failure to serve notice upon him of Deco's petition to reopen the estate, rendered all subsequent orders null and void because the court lacked jurisdiction. Alternatively, the petitioner argues that the manifest weight of the evidence shows that the petitioner never authorized the entry of judgments against himself and that the court disregarded evidence showing a conflict of interests between the petitioner and his alleged attorneys which would render all orders affecting petitioner null and void.

The issue, of course, is a factual one. The function of this court is to determine whether the order of the trial court denying petitioner's motion to vacate the orders entered on February 23 and March 8 is against the manifest weight of the evidence. The petitioner's proof rested almost entirely on his own testimony and the respondent's proof rested on the testimony of Michael Rotman and Gary Griffin.

The petitioner did admit, however, that he was informed by Gordon & Reicin of Deco's petition several months before the entry of the first order, that Deco's claim was a valid one and that he would have to come up with some money. He also admitted reading Deco's petition at that time, though he said the matter of whether Gordon & Reicin would represent him was never discussed. He stated that he told Gordon, Reicin and Rotman that it was their mistake, that they should pay the $3,000.00 and that he then stormed out of their office. Yet, afterwards, Tolash sent a communication to the law firm apparently about Deco's claim.

We have stated many times that the determination of disputed questions of fact is primarily a function of the trier of the facts and that its finding should not be disturbed unless it is manifestly against the weight of the evidence, regardless of how we might have held had we been the trier of the fact. Harvey v. Lippens, 87 Ill. App. 2d 363, 231 N.E.2d 613. Where the evidence is conflicting, as it is here, and where different inferences may be drawn therefrom, it is for the trier of the facts to determine where the preponderance lies.

After carefully examining the record with the abovementioned principle in mind, we believe there is substantial evidence in the case at bar to support the judgment orders of the Circuit Court. It is not enough that the evidence might support some other conclusion. When all of the evidence is considered, it is our opinion that there was adequate evidence to show that Gordon & Reicin represented Tolash with his consent and knowledge and that with his authorization they settled the matter. We are not persuaded that the court disregarded the contention of Tolash that there was a conflict of interests between him and the firm of Gordon & Reicin.

We are mindful that "[a]n attorney must be actually employed for the purpose before he can represent a party litigant in court. The relation of client and attorney must subsist between them. That relation cannot be created by the attorney alone, nor by the attorney and a third party who has no authority to act." Scharlau v. Lombard State Bank, 278 Ill. App. 504, 507. However, inasmuch as we find that the conclusion of the trial court is not against the manifest weight of the evidence, we need not reach the question of the effect of the alleged unauthorized representation on the three orders in question.

For the reasons stated the judgment of the Circuit Court denying the petition to vacate the orders of February 23 and March 8 is affirmed.

AFFIRMED.

ADESKO, P. J. AND MURPHY, J.
CONCUR.
(Abstract only)

52824

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. EDWIN DIXON (Impleaded), Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE ALVIN J. KVISTAD Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

Edwin Dixon [defendant] and Johnny Williams were indicted for armed robbery and were tried on September 21, 1967, defendant having entered a plea of not guilty. The court found the defendant guilty and sentenced him to the Illinois State Penitentiary for a term of not less than five nor more than ten years. From that judgment this appeal is taken. In this court the defendant contends that he was not proved guilty beyond a reasonable doubt.

On January 16, 1967, at about 8:40 p.m., two men entered the grocery store of Raymond Ross at 1228 South Wood Street, Chicago. The first man [identified by Ross as Dixon, the defendant] came toward Ross with a long-barrelled shot gun and forced him and a companion [William Blunt, who lived with Ross] to lie on the floor; Ross behind the meat counter, and Blunt near the stove.

Ross testified that while lying on the floor he looked through the glass windows of the meat counter and saw the defendant going through the cash register; that the lights were on and he could see clearly. Ross testified that the defendant had taken several dollars from his pocket and $80 or $85 from the register.

Ross further testified that he had known the defendant seven or eight years and had seen him quite often in the neighborhood; that although the defendant was wearing a mask

on the lower part of his face at the time of the robbery, Ross saw his eyes, nose and forehead. He stated that the defendant was in his store on March 13, 1967, at which time Ross heard his voice, and that it was the same voice as that he had heard on January 16, when the defendant had robbed him. On cross-examination, when Ross was questioned about the defendant's visit to his store on March 13, defense counsel asked: "You can tell us positively, no doubt in your mind, that that is the same voice you heard on January 16th, 1967?" Ross answered, "No, sir, I cannot."

William Blunt, called as a witness for the State, testified that on January 16 he was in the grocery store with Ross when two men came in; one who was wearing a mask told him to lie on the floor, which he did. He stated that he could not identify the men and did not know whether the one with the mask was the defendant or Williams.

Williams and the defendant testified in their own behalf and denied any participation in the robbery. The defendant testified that he had first heard of the Ross robbery when he was being arraigned on another robbery charge on May 13, 1967; that on the day of the Ross robbery he was moving to a new apartment; that at 8:00 p.m. he was moving some of his furniture to 1510 South Harding, using his father-in-law's car and a rented trailer. He stated he had rented the trailer from West Side Trailer Company, but did not have a receipt. His wife corroborated his testimony and stated it was after dark when they moved.

Defendant argues that the identification by Ross was not so positive as is considered necessary to support a conviction, and stresses the fact that the face of the robber was partially covered by a mask. He further urges that his alibi should be considered to exonerate him from any connection with

the robbery. However, the defendant ignores the fact that Ross had known him for seven or eight years.

The defense has cited a number of cases in support of the contention that where there is a one-witness identification the court should accept the defendant's alibi and acquit him. None of these cases is strictly applicable on the facts therein alleged. In People v. Wheeler, 5 Ill. 2d 474, the defendant was identified by two witnesses. He also presented an alibi. The court said at page 483:

> "Where the corpus delicti is proved, together with evidence tending to show the guilt of the defendant, the burden of establishing the alibi rests upon him, although upon the whole case his guilt must be proved beyond a reasonable doubt. (People v. Renallo, 410 Ill. 372; People v. Kerbeck, 362 Ill. 251.) The law has committed to the jury the determination of the credibility of the witnesses and the weight to be given their testimony and this court will not substitute its judgment for that of the jury merely because the evidence is conflicting. [Citing cases.] Where there is positive identification of a defendant by credible witnesses, a guilty verdict may be sustained notwithstanding there may be otherwise uncontradicted alibi evidence and even though the alibi witnesses may be greater in number than those identifying the accused."

In People v. Mero, 4 Ill. 2d 327, it was argued that there was not sufficient identification and that the alibi evidence of the accused stood unchallenged and undisputed. The court said at page 335:

> "This court will not disturb a verdict of guilty on the ground that the evidence is not sufficient to convict, unless it is so palpably contrary to the verdict, or so unreasonable, improbable, or unsatisfactory as to justify the court in entertaining a reasonable doubt of the defendant's guilt. (People v. Heaton, 415 Ill. 43.) Further, the law has committed to the trial court, where a cause is tried by the court without a jury, the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting this court does not substitute its judgment for that of the trial court. People v. Renallo, 410 Ill. 372; People v. Golson, 392 Ill. 252."

Concerning the alibi evidence, the court further said:

> ". . . it is to be noted that where an identification is positive and the testimony credible, a judgment will not be reversed merely because there was only one identifying witness and a greater number of persons, including the defendant, testified that he was elsewhere when the crime was committed. (People v. Renallo, 410 Ill. 372; People v. Viti, 408 Ill. 206.)"

In the instant case the alibi evidence is not strong; it consists of the testimony of the defendant and his wife. Evidence which he could have brought in to support his alibi, such as the receipt for the trailer allegedly rented, together with evidence that he had rented the apartment, does not appear in the record.

The defendant argues that the identification by Ross was vague and uncertain; however, it must be considered that Ross had known the defendant for a number of years, and the fact that part of his face was concealed did not necessarily destroy the sufficiency of his identification.

The defendant stresses the fact that Ross stated on direct examination that he subsequently recognized the voice of the defendant in his store to be the same as that of the man who had participated in the robbery; that later, when he was asked on cross-examination whether he could say positively with no doubt in his mind that the voice he heard on March 13 was the same as that he heard on January 16, he answered he could not. This point is not argued at all in defendant's brief, but in any case, it could have indicated to the trial court that the witness was extremely conscientious. The eyewitness identification by the witness remained unshaken.

The defendant was proved guilty beyond a reasonable doubt, and the judgment is affirmed.

AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

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111 I.A. 2nd 160

No. 68-92

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1969.

CLYDE STEWART, LORA STEWART, ELDRED JONES and VIOLA JONES, Plaintiffs-Appellees, vs. MAIN INSURANCE COMPANY, Defendant-Appellant.	Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois Honorable J. LEWIS BOND Presiding Magistrate

Abstract

RYAN, J.

In a trial without a jury, a Magistrate awarded the plaintiffs $8,000.00 under the terms of a fire insurance policy which had not been issued at the time of the fire loss. The Court further awarded the plaintiffs $2,000.00 as attorneys' fees for the defendant's vexatious and unreasonable refusal to pay plaintiffs' fire claim. Defendant has appealed.

Although the facts were disputed, we believe that there was ample evidence in the record to justify the judgment of the Trial Court. The matter at issue was whether an oral binder to issue an $8,000.00 fire insurance policy had been given. Although the issuance of an oral binder was denied by one Spiegel who was an employee of defendant insurance company, there was testimony in the record by one Hardesty who was an insurance agent and who was the person from whom the policy was solicited that both Spiegel who was defendant's employee and with whom he had had previous dealings and Horter, who was defendant's Vice-President and whose authority would certainly have been apparent if not actual, indicated orally that the property was bound and that the policy of insurance would issue.

It is a well established rule of law that a Court of Review will not substitute its judgment for that of a Trial Court and will not reverse the Trial Court's finding on a question of fact unless such finding is contrary to the manifest weight of the evidence. Godfrey v. Brown, 81 Ill App2d 453, 225 N.E.2d 98,99.

While it is true in this case that the written judgment order of the Trial Court does not set out separately and in detail its findings of fact, a perusal of the record reveals that sufficient factual evidence was presented to justify said judgment. It must be assumed that such facts were relied on by the Trial Court in reaching its decision.

Although we are not disposed to review the evidence for the purpose of substituting our judgment for the Trial Court, we have reviewed the evidence to determine whether there was any abuse of discretion and whether the judgment of the Trial Court was contrary to the manifest weight of the evidence. We feel that the decision of the Trial Court was not contrary to the manifest weight of the evidence. It was, in fact, the most reasonable and plausable construction of the contested point. In addition to the testimony mentioned above, evidence of the issuance of other policies, conversations and memoranda indicate that the actual issuance of the policy was most probably delayed as a collection technique on the part of the insurance company. The agent in question had been delinquent in remitting premiums. Other policies were held up. The agent paid a substantial sum to apply on premiums and a number of policies were issued simultaneously upon receipt of the money. If the defendant company had bound the risk, which the Trial Court obviously believed from the evidence, then the defendant was obligated under the policy which was to issue even though the actual issuance had been delayed and the loss occurred before such issuance. 22 Ill. Law and Practice 145.

Defendant stresses the point that the agent in this case had no authority to bind the company. The case of Moore v. Ins. Co. of North America, 49 Ill. App2d 287, which is relied upon by defendant, held that an offer to enter into a contract which is not accepted creates no rights and, further, that the defendants are not estopped to deny coverage by a delay in acceptance. The situation in the More case differs from the instant case in that there was testimony in the record here that two employees of the defendant insurance company had affirmatively indicated that the risk in this case was bound. Hence, we are not concerned that the agent himself may have lacked authority to bind the risk. If the trial judge believed these facts, then any discussion or argument concerning estoppel is beside the point. In the instant case, it is clear that the agent had authority by its agency contract to issue policies and binders which the company authorized. All the judge needed to find was that there was an agency; that the agency accepted an application and submitted it to the defendant company; and that the defendant company bound the risk.

The defendant has alleged that the Trial Court erred with regard to certain testimony which was offered. In this connection, two offers of proof were made. An offer of proof was made as to whether there was a company policy limiting coverage to $5,000.00. To testify concerning this policy, the defendant offered Spiegel who was a minor employee of the company. Any knowledge he would have had as to company policy would have been hearsay. Furthermore, the defendant did not make clear what was meant by company policy. Most reasonably, one would assume that company policy would have been established by a resolution of the Board of Directors or by some order of a managing corporate officer. In any event, however, in this case it would not seem that "company policy" could be proven by the oral testimony of this minor company employee without a

further showing that this was not just his own interpretation or opinion as to what constituted "company policy". We do not believe that the Trial Court erred in this ruling.

The second offer of proof pertained to whether or not the same Spiegel had ever bound any coverage orally. Although the offer of proof was denied, this information was elicited both on direct examination and on cross-examination to the effect that Spiegel had never bound anyone. Hence, we can find no prejudicial error in this ruling.

Finally, the defendant argues that the award of attorneys' fees to plaintiffs under Ill. Rev. Stat., Ch. 73, § 767 (1967) for "the vexatious and unreasonable" refusal to pay the amount of the claim to defendant should not be sustained since the conduct of the defendant was not unreasonable. Defendant argues in the alternative that if it were proper for the Trial Court to make an award for attorneys' fees in this case, that the award of $2,000.00 exceeded the limitation of the award as set forth in the statute which provides that the allowance shall not exceed any one of the following amounts:

(a) 25% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;

(b) $1,000.00

If the Trial Court believed, as it obviously did, that two employees of the defendant company, one of whom was a Vice-President, had orally bound this risk and then refused to honor the loss, the Trial Court would certainly be entitled to conclude that the defendant's conduct was both unreasonable and vexatious. We are not disposed to interfere with or disturb such finding. On the other hand, while the award is within the 25% limitation which is set by statute, it exceeds the statutory $1,000.00 limitation and should be reduced by the amount of the excess.

The judgment of the Circuit Court of Peoria County is accordingly affirmed except to the extent that the award of attorneys' fees exceeds $1,000.00. With regard to such excess

award of attorneys' fees, that part only of the judgment is reversed. The reduced award of attorney fees shall be apportioned among the plaintiffs in the same percentages as previously determined by the Trial Court.

AFFIRMED IN PART AND REVERSED IN PART.

STOUDER, P. J. and concurs.

ALLOY, J. ~~concurs~~

(3725—2M—12-68) 14

111 IA 2 227

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE SAMUEL O. SMITH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 15th day of JULY A. D. 1969, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11072 Agenda No. 69-34

People of the State of Illinois,
Plaintiff-Appellee
vs.
Marvin Earl Miller,
Defendant-Appellant

Appeal from
Circuit Court
Jersey County

TRAPP, P. J.

Plaintiff was sentenced to a term of not less than three years nor not more than fifteen years upon his plea of guilty to burglary. This appeal asks only a reduction of the maximum sentence, or in the alternative, for remand for re-sentence after the opportunity to present evidence in mitigation.

Upon arraignment defendant signed a written waiver of indictment and trial by jury and pleaded guilty, and upon being admonished of the consequences of such plea persisted therein. There was no petition for probation filed and the record indicates waiver of such right in open court. The cause was set for hearing in mitigation and aggravation and a hearing held some two weeks subsequent to the plea. The defendant advised, in open court, that he had no evidence to offer in mitigation. The court then made inquiry which disclosed that defendant was twenty years of age and had quit school at the age of sixteen

upon the completion of the ninth grade. Defendant was unmarried and then residing with his parents, and stated that he had not had any steady employment.

Evidence placed in the record discloses that defendant was convicted of interstate transportation of a stolen motor vehicle, that the probation granted for such offense had been revoked and that he had served a year in a Federal penitentiary. Defendant was discharged from such sentence on March 12, 1968. He was charged with this offense on July 29, 1968.

Defendant argues that there was insufficient judicial attention to his prospects for rehabilitation and reform, and that the court had failed to develop the fullest possible information concerning defendant's life in that the court did not order a pre-sentence investigation. There is no statutory provision which requires a pre-sentence investigation. People v. Smith, (1965), 62 Ill. App.2d 73; 210 N. E.2d 574. A hearing in mitigation and aggravation is mandatory to assist the court in determining the appropriate terms of a sentence unless such hearing is expressly waived by the defendant and not requested by the State's Attorney. People v. Smice, 79 Ill. App.2d 348; 223 N. E.2d 548; People v. Mace, 79 Ill. App.2d 422; 223 N. E.2d 725; People v. Spaulding, 75 Ill. App.2d 278; 220 N. E.2d 331.

In this case a hearing in aggravation and mitigation was held some two weeks after defendant's plea. He declined to offer evidence. The court's inquiry disclosed his education, the absence of dependent family and his want of any but casual employment. These factors of pre-sentence investigation are essen-

tially negative in a few simple words.

The prospects of rehabilitation and reform are presented in the record of his conviction of a Federal felony and his inability to complete the probation which had been granted. The defendant does have some burden to present mitigating factors. People v. Smith, (1965), 62 Ill. App.2d 73; 210 N. E.2d 574. We do not agree with counsel's argument that the trial court should have sat as a court of review to enquire into the basis of the revocation of probation in the Federal court.

As to the argument that a spread of twelve years between the minimum and maximum term of the sentence is excessive, it is correct as argued by the State's Attorney that the minimum sentence to be served before parole is not affected by the length of the maximum sentence. Defendant cites People v. Shannon, 56 Ill. App.2d 154; 206 N. E.2d 106, where the court of review reduced the maximum sentence fixed by the trial court. As noted in People v. Valentine (1965), 60 Ill. App.2d 339; 208 N. E.2d 595, such action by the court of review was unexplained. Neither defendant's argument nor the record suggests that the minimum sentence is excessive. The course of defendant's rehabilitation is not prejudiced by the maximum sentence. People v. Jones, 92 Ill. App.2d 124; 235 N. E.2d 379.

The judgment of the trial court is affirmed.

AFFIRMED.

CRAVEN and SMITH, J. J. concur.

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Abstract

No. 68 198

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

GARY D. SHELLER,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the Circuit
	)	Court of Kane County,
NANCY LEE JOYCE,	)	Illinois.
	)	
Defendant-Appellant.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The defendant prosecutes this appeal from an order of the Circuit Court of Kane County, Magistrate's Division, entered on October 21, 1968, that denied her motion to vacate a judgment that had been entered against her on September 30, 1968.

On September 10, 1968, the plaintiff, pro se, filed a small claim complaint that alleged that the defendant was indebted to him in the amount of $238.58 for damages incurred as a result of an auto accident caused by the defendant's "failure to yield right of way." Summons was issued by the Clerk of the Court that provided that the defendant was to appear before the court at 10:00 A.M. on September 30, 1968. The summons and a copy of the complaint were served on the defendant by registered mail.

On September 16, 1968, the husband of the defendant,

an attorney, filed his appearance on her behalf and an answer that denied the allegations of the complaint. On September 30, judgment was taken against the defendant in the amount of $238.58 and costs when she failed to appear as summoned.

On October 21, 1968, the court considered the defendant's motion to vacate the judgment and supporting affidavit. That affidavit recited:

> "Nancy Lee Joyce, being duly sworn on oath, does depose and say as follows:
>
> 1. Your affiant has a good defense to this action, namely: that the accident was caused by the fault of the Plaintiff.
>
> 2. That this affiant Defendant, herein, and wife of her attorney Thomas Joyce could not for sure make certain of the time of the court hearing as set forth in the summons received by Affiant in the mail. That Affiant thereupon telephoned the Clerk's office of this Court and was informed by a lady therein that the Judge herein heard the cases only in the afternoon and received phone calls and did his office work only in the morning and to be in court then at one o'clock P. M.
>
> 3. Further Defendant's attorney, a few days prior to the hearing date, had a kidney stone attack and planned to hire a local Kane County Attorney to appear in the afternoon at the appointed hour and he phoned in the morning for the exact time of trial."

The court then denied the motion to vacate.

The summons served upon the defendant clearly indicated that she was required to appear at 10:00 A.M. on September 30 or that ". . . . a judgment by default may be taken against you for the relief asked in the complaint." Supreme Court Rule 286 (Ill. Rev. Stat. 1967, ch. 110 A sec. 286) provides that " . . the defendant in a small

claim must appear at the time and place specified in the summons and the case shall be tried on the day set for appearance unless otherwise ordered."

It is difficult to understand why the defendant or her attorney "could not for sure make certain of the time of the court hearing . . " or the need to telephone the clerk.

As is well known, a motion to vacate a default judgment is one that is addressed to the sound discretion of the trial court and that discretion will not be disturbed unless it appears to have been abused. Dross v. Farrell-Birmingham Co., Inc. 51 Ill. App. 2d 192, 197. Ordinarily, a default judgment will not be set aside unless the party shows due diligence in the protection of his rights.

We cannot say that the trial court abused it's discretion in this case. There is nothing in the record to indicate why the defendant was in doubt as to the time to appear in court. It would create havoc in the operation of our courts if a failure to appear could be excused solely on the basis of misinformation allegedly received by a telephone conversation with an unidentified clerk.

The defendant further contends that the judgment was improper since interrogatories had previously been served on the plaintiff prior to September 30. Supreme Court Rule 287 (Ill. Rev. Stat. 1967, ch. 110 A sec. 287.) prohibits the use of interrogatories or other discovery proceeding except by leave of court, in a small claims proceeding.

For the reasons stated, the order of the trial court will be affirmed.

JUDGMENT AFFIRMED.

MORAN, P. J. and DAVIS, J. concur.

NO. 68-185

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT CHASE, et al, Plaintiffs - Appellants, vs. NICK BALDASSANO, et al, Defendants - Appellees.	Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

On April 12, 1966, the plaintiffs brought suit in the Circuit Court of Lake County for injuries allegedly suffered by them on April 14, 1964, as a result of the negligence of the defendants. On November 3, 1966, the complaint was stricken on the grounds that it failed to state a cause of action pursuant to motion of the defendants and on November 28, 1966, the plaintiffs were permitted to file their amended complaint. The defendants answered the amended complaint on December 30, 1966, but no further action was taken until the defendants filed interrogatories on May 24, 1967. Subsequently the plaintiffs filed their interrogatories and answers to both were filed in September and October, 1967.

On December 5, 1967, the cause was placed on the master jury trial calendar on the plaintiffs' motion but on March 25, 1968, was taken off the April and placed on the June call on their motion. On May 6, 1968,

the plaintiffs' original attorneys were permitted to withdraw from the case and present counsel substituted in their stead. On May 31, 1968, the court denied plaintiffs' motion to take the cause off the June trial call and it was called for trial on June 7, 1968.

The next item that appears in the record is an unsworn "affidavit" filed June 7 and signed by Kenneth Ditkowsky as attorney for the plaintiffs wherein he states that he had represented his clients for only 30 days and that he was unable to proceed with trial because his witnesses were not available and he needed the evidence deposition of the treating physician who resided in Massachusetts. An order of the same date states that on motion of the plaintiffs the cause was taken off the June call and placed on the October calendar.

On July 9, the defendants filed a motion wherein they itemized expenses of $545.95 incurred by their attorney in their preparation for trial including costs of investigation, attorneys fees, witness fees and other charges. They further alleged that those expenses could have been avoided had the plaintiffs or their attorney appeared at a pre-trial conference on May 29 and that under the circumstances they should be reimbursed.

On July 19, an order was entered that provided as follows:

> "...it is hereby ordered Messrs. Diver, Diver, Ridge and Brydges be and are hereby granted the sum of $125.95 for investigative costs and subpoena fees and the further sum of $360.00 as and for attorney fees in preparation for trial.
>
> It is further ordered that the aforesaid total sum of $485.95 be paid to the said Messrs. Diver, Diver, Ridge and Brydges within 30 days from the date of this order."

On October 1, 1968, the court denied the plaintiffs' motion to

vacate the order of July 19 and dismissed their complaint for failure to pay the sums as ordered. On October 7, the plaintiffs appealed from the orders of July 19 and October 1.

The plaintiffs contend that the order of July 19 was improper and must be reversed for the following reasons:

(1) The trial court had no power to order the payment of fees and costs without express statutory authority.

(2) If the trial court did have the power to order the payment of fees and costs, it could only order that they be paid to a party to the litigation.

(3) The order was vague and indefinite in that it did not specify who was to pay the fees and costs.

(4) The court had no power to assess fees and costs prior to a final resolution of the lawsuit.

The plaintiffs also contend that the order of dismissal on October 1 was improper and violated their rights to a trial by jury as guaranteed by the Illinois and United States constitutions.

Supreme Court Rule 231 (Ill. Rev. Stats, 1967, Ch. 110A, sec §219) provides in part as follows:

"§231. (Supreme Court Rule 231). Motions for Continuance

(a) Absence of Material Evidence. If either party applies for a continuance of a cause on account of the absence of material evidence, the motion shall be supported by the affidavit of the party so applying or his authorized agent. The affidavit shall show (1) that due diligence has been used to obtain the evidence, or the want of time to obtain it; (2) of what particular fact or facts the evidence consists; (3) if the evidence consists of the testimony of a witness, his place of residence, or if his place of residence is not known, that due diligence has been used to ascertain it; and (4) that if further time is given the evidence can be procured.

(b) When Continuance Will Be Denied. If the court is satisfied that the evidence would not be material, or if the other party will admit the affidavit in evidence as proof only

of what the absent witness would testify to if present, the continuance shall be denied unless the court, for the furtherance of justice, shall consider a continuance necessary....

(g) Taxing of Costs. When a continuance is granted upon payment of costs, the costs may be taxed summarily by the court, and on being taxed shall be paid on demand of the party, his agent, or his attorney, and, if not so paid, on affidavit of the fact, the continuance may be vacated, or the court may enforce the payment with the accruing costs, by contempt proceedings.

When the trial court granted a further continuance to the plaintiffs on June 7, it made no written reference to a possible imposition of costs as a condition of the continuance. However, we agree with the defendants that it is sufficiently obvious that the order of July 19 was a modification of the order of June 7 and based on the authority of Section 231 (g). There is nothing in that section that would require that the court tax the costs at the time the continuance is granted and in many cases, such as here, it would be difficult if not impossible so to do. The motion was made on the day set for trial with no prior notice to the defendants and presumably with the court in the midst of a busy trial calendar. Under the circumstances, a subsequent consideration of the question of costs was proper.

Although the order provided that the sum taxed by the court be payable to the defendants' attorneys, it is abundantly clear that the expenses incurred were the defendant's expenses and the payment would in effect be payment to the defendants. We see no good reason to hold that Rule 231 (g) permits the court to tax costs only in the name of a party litigant. We further conclude that the order was sufficiently clear and not defective for reasons of "vagueness" as urged by the plaintiffs.

As we have seen, Rule 231 (g) provides that the court may vacate the continuance in the event that the costs are not paid. If the order of continuance was vacated the matter would stand as it did on June 7, the date set for trial. The Circuit Court for the 19th Judicial Circuit had as of July 1, 1967, the following rule promulgated in accordance with statutory authority (Ill. Rev. Stats, 1967, Ch. 37 par. 72.28)

> "FAILURE TO PROCEED.. Failure of a party to be ready when the case is reached for trial will subject the cause to dismissal for want of prosecution or judgment by default."

The right of every litigant to have his cause tried on the merits as fairly and impartially as possible is subject to reasonable restrictions. Courts can, and in the interest of the administration of justice, must, impose such rules as are necessary to insure an orderly disposition of the cases presented to it. The rule that litigants and their trial counsel should be prepared to proceed on the day set for trial is obviously an indispensable one to prevent chaos in the crowded dockets of modern courts. For that reason, Supreme Court Rule 231 and former rules of similar substance permitted continuances on the day of trial only in cases of extreme and verified necessity. The right of the plaintiffs to have their cause heard on the merits was subject to their compliance with those rules as imposed within the discretion of the trial court. Jones v. Reuss, 70 Ill. App. 2d 418; Coleman v. Toohey, 48 Ill. App. 2d 75.

The record in regard to the diligence of the plaintiffs in the prosecution of this suit is not an impressive one. The complaint was

filed two days before the bar of the Statute of Limitations and discovery was not initiated for another 14 months. The deposition of the attending physician had not been taken 2 years after the suit had commenced and more than 4 years after the accident.

[1] Under the circumstances, the court was extremely liberal in granting a continuance on June 7 under any condition. The subsequent failure of the plaintiffs to make any effort to comply with the order of July 19 was ample reason to dismiss their complaint and well within the discretion of the trial court.

The order of dismissal will therefore be affirmed.

AFFIRMED.

MORAN, P. J., and DAVIS, J., Concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2d day of December, in the year of our Lord one thousand nine hundred and sixty-eight, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit : On AUG 8 1969 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

DO NOT PUBLISH

NO. 68-182

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES KEESHIN,

Plaintiff-Appellant,

vs.

ROGER L. McDOUGAL, KENNETH SANDAHL and LEE ROY SANDAHL, Individually, and d/b/a SANDAHL FARM SERVICE,

Defendants-Appellees.

ROGER McDOUGAL,

Plaintiff-Appellee,

vs.

CHARLES KEESHIN,

Defendant-Appellant.

Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County, Illinois.

PRESIDING JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

This is an appeal from a bench trial wherein the trial court, on July 15, 1968, found against the appellant on his complaint and in favor of the appellee on his counter-claim.

The following is a sequence of events. On November 22, 1968, the appellant

after first filing his notice of appeal in the trial court, filed his certificate in lieu of the record in this Court. On December 23, 1968, he filed his designation of excerpts and brief. The case then remained dormant. Under Supreme Court Rules 342 (a) and 343 (a) the appellee, on January 31, 1969, should have filed his answering brief and additional designation of excerpts of record, if any.

On March 17, 1969, the clerk mailed the call of cases set for oral argument to all attorneys of record. Although the appellee had not entered his appearance pro se or by counsel, the clerk, nevertheless, forwarded a call of the cases to counsel for the appellee. This case was set for the first day of the call which was Monday, March 31, 1969.

On March 19, 1969, the appellant, after due notice to the appellee, requested a day certain on which to file excerpts of record. The motion was allowed and excerpts were ordered filed on March 25, 1969. This was accomplished.

On March 25, 1969, the appellee mailed to the clerk of this Court a motion to file his brief instanter along with a stipulation thereto by the appellant. However, no reason for non-compliance was given. This motion was received on the Thursday prior to the Monday when the case was to be argued. The appellee appeared at the time set for oral argument and presented his motion to the Court. We denied the motion because of the appellees failure to attempt to comply with the rules governing review of cases.

The result of the appellee's tardiness of approximately two months has now placed this Court in the position of having only the briefs of the appellant. To review the cause in this stance would necessarily impose upon us the responsibility of an advocate. This we refuse to do. See, Shanholtzer v. McDaniel, 97 Ill. App. 2d 81 (Abst.1968); Woodward v. Woodward, 96 Ill. App. 2d 251, 252 (1968).

Consequently, that portion of the appellant's prayer for relief requesting a retrial will be allowed.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Abrahamson and Seidenfeld, J.J. - Concur

United States of America

State of Illinois,
Appellate Court,
Second District. } ss.

I, Howard K. Kellett, *Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.*

In Testimony Whereof, *I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this* 11th *day of* August *A. D. 19*72

Howard K. Kellett

Clerk Appellate Court,
Second Judicial District